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No. 91-437

In the Supreme Court of the United States

OCTOBER TERM, 1991

TYRONE M. SMALLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM R. DUGAN, JR.
Col., AFLSA, USAF

BRENDA J. HOLLIS
Lt. Col., AFLSA, USAF

JAMES C. SINWELL
Capt., AFLSA, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Air Force Legal Services Division
Bolling Air Force Base
Washington, D.C. 20332-6128

QUESTION PRESENTED

Whether prosecuting petitioner for failing to obey an Air Force regulation that required him, under penalty of criminal prosecution, to produce proof of possession or lawful disposition of certain tax-exempt items when requested to do so by appropriate military authorities, violated his Fifth Amendment privilege against compelled self-incrimination.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-6a, is reported at 32 M.J. 398. The opinion of the Air Force Court of Military Review, Pet. App. 7a-17a, is reported at 30 M.J. 666.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 21, 1991. The petition for a writ of certiorari was filed on September 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

1. By agreement with the United States, the Republic of the Philippines permits United States servicemembers stationed there to import various goods from abroad without paying local taxes and customs duties. USCINCPACREPPHILINST 4066.7Q, General Merchandise Control Regulations of the Republic of the Philippines, Privacy Act Statement ¶ 4 (Background), Pet. App. 20a-21a [hereinafter GMCR]; see GMCR Privacy Act Statement ¶ 1 (Statement of Purpose), Pet. App. 19a. Tax-exempt goods are for the use of United States servicemembers only; they may not be resold to Filipinos, as such sales would deprive the Philippine government of income from import duties. GMCR Prohibited Acts and Practices ¶ 2a, Pet. App. 25a; *United States* v. *Hilton*, 29 M.J. 1036, 1041 (A.F.C.M.R.), aff'd, 30 M.J. 118 (C.M.A. 1990). The agreement between the United States and the Republic of the Philippines imposes on the United States an affirmative duty to ensure that tax-exempt goods are not resold to Filipinos on the black market. *Ibid.* (quoting U.S. Military Base Agreement with the Republic of the Philippines, Art. XVIII).

The incentive for the development of a black market in tax-exempt goods is quite strong. Customs duties in the Philippines can double the cost of some goods, such as automobiles. See *Hilton*, 29 M.J. at 1042. As a result, Filipinos can save a substantial amount of money by buying—and United States servicemembers can make a handsome profit by selling—tax-exempt goods on the black market.

To comply with its agreement to prevent the development of a black market, the United States Air Force adopted regulations prohibiting servicemembers from disposing of tax-free goods to individu-

als who are not servicemembers. GMCR Prohibited Acts and Practices ¶ 2a, Pet. App. 25a; see *Hilton*, 29 M.J. at 1043-1044. Servicemembers are also required to "show possession or authorized disposition of" tax-exempt property when directed to do so by military authorities. GMCR Prohibited Acts and Practices ¶¶ 2r, 3h, Pet. App. 27a, 28a. Aware that this latter requirement could raise Fifth Amendment concerns, military courts have held that the regulations require production of the tax-free item or documentation showing *lawful* disposition, *United States* v. *Williams*, 29 M.J. 112, 115 (C.M.A. 1989), but that they may not be used to compel testimony that would incriminate the individual, *United States* v. *Lee*, 25 M.J. 457 (C.M.A. 1988).

2. Petitioner is a member of the United States Air Force stationed at Clark Air Base, in the Philippines. He purchased a tax-exempt Chevrolet Blazer and a tax-exempt Toyota Celica, but he failed to register either of them at the base. A merchandise control officer, noting petitioner's failure to register the cars, asked petitioner to show possession or authorized disposition of his tax-exempt items. The officer did not ask petitioner to admit that he made an unauthorized transfer of the cars, nor did he ask petitioner to admit having ever owned or possessed them. In response to the inquiry, petitioner failed to produce the tax-exempt items or proof of their lawful disposition. PX 1. When petitioner requested counsel, the inquiry was terminated.

3. Petitioner was charged with violating two provisions of the GMCR by failing to show possession or authorized disposition of tax-exempt personal property, namely four car tires and two cars. GMCR Prohibited Acts and Practices ¶¶ 2r, 3h, Pet. App. 27a, 28a. He pleaded guilty. He admitted that he had failed

to show possession or authorized disposition, because he had sold the tires and cars illegally. Tr. 34-35, 38-40. In fact, it appears that petitioner purchased both cars solely for the purpose of selling them illegally, since he never took possession of either one. Tr. 38-44.

During the detailed guilty plea inquiry required in the military system,[1] petitioner said he was satisfied with the advice of both of his attorneys. Tr. 13-14. Petitioner also acknowledged orally and in writing that he considered his attorneys competent, that they had discussed potential defenses that might apply, and that it was petitioner's decision to plead guilty. Tr. 53-54; AX 5. Petitioner did not assert a violation of his Fifth Amendment privilege against compelled self-incrimination.

4. On appeal to the Air Force Court of Military Review, petitioner argued that his pleas of guilty were involuntary because the trial judge did not advise him that he had a possible defense based on his privilege against compelled ~~against~~ self-incrimination. The court of military review upheld the conviction, with a slight modification. Pet. App. 7a-17a. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 1a-6a.

ARGUMENT

Petitioner failed to raise a legal challenge to his conviction before the court-martial, and instead entered his guilty plea. Now, however, he asks this

[1] See *United States* v. *Care*, 40 C.M.R. 247 (C.M.A. 1969) (when a military accused desires to plead guilty, the trial judge must explain the elements of the offense(s) to the accused, ask questions to be convinced the accused is guilty, and advise the accused of the various rights he forfeits by his plea, such that his plea is knowing, intelligent, and conscious).

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Court to reverse his conviction on the ground that it is inconsistent with the Fifth Amendment. Because petitioner did not properly raise the claim below and because the regulation is constitutional in any case, review by this Court is unwarranted.

1. In *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), this Court stated:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Because petitioner failed to raise the claimed deprivation of his Fifth Amendment rights before pleading guilty, *Tollett* forecloses his challenge to his conviction. Cf. *McMann* v. *Richardson*, 397 U.S. 759 (1970) (guilty plea constitutes a waiver of the claim that the government extorted a confession from the defendant, in violation of the Fifth Amendment).

Relying on *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61 (1975), petitioner asserts that his challenge is not barred because it goes to the very power of the government to bring him into court. Specifically, petitioner maintains that the offense to which he pleaded guilty is not an offense at all. It is by no means clear, however, that the claim petitioner now seeks to raise is one that challenges the authority of the government to bring him to trial. His claim is simply that the regulations at issue required him to incriminate himself, which is not necessarily different from the claim that a law enforcement officer forced petitioner to incriminate himself under a different regulation. In either case, petitioner's challenge is not to the govern-

ment's authority to try him, but is to the government's use of legal or extra-legal authority to wring incriminating evidence from him. That type of claim is one that is waived through a guilty plea. *McMann* v. *Richardson*, *supra*. In any event, the regulation at issue in this case is constitutional.

2. It is well established that the government may require the keeping of records that may be inspected and used in prosecuting statutory violations committed by the recordkeeper himself. *Shapiro* v. *United States*, 335 U.S. 1, 32-33 (1948); *Davis* v. *United States*, 328 U.S. 582, 589-590 (1946). As this Court has explained, the Fifth Amendment privilege may not be asserted "in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" *Shapiro*, 335 U.S. at 33 (quoting *Davis*, 328 U.S. at 589-590). That settled principle controls this case.

a. To comply with its treaty obligations with the Republic of the Philippines, the United States Air Force prohibits the sale of tax-exempt items to persons who are not servicemembers. The pertinent regulation requires servicemembers to show, on demand from an appropriate authority, "possession or authorized disposition of" tax-exempt property. GMCR Prohibited Acts and Practices ¶¶ 2r, 3h, Pet. App. 27a, 28a. It cannot be claimed that the restrictions on sales of tax-exempt goods are not "validly established," *Shapiro*, 335 U.S. at 33; the Air Force has a weighty and legitimate interest in upholding its treaty obligations by prohibiting its members from black-marketing tax-exempt goods. Nor can it be asserted that the transactions are not "the appropriate subjects of governmental regulation." *Ibid.* The

Air Force may legitimately enforce its restrictions by requiring servicemembers to maintain records of transactions conducted in tax-exempt goods. Petitioner does not contend otherwise. Instead, petitioner claims that the regulation is not a recordkeeping requirement at all because it does not require him "to keep any records." Pet. 6-7.

As the Court of Military Appeals explained in *United States* v. *Williams*, 29 M.J. at 115, the Air Force regulations require the possession of the item or "some type of documentation or other papers showing lawful disposition." See *Hilton*, 29 M.J. at 1049 (quoting *Williams*). Indeed, military officials are permitted to request production of *only* the item or documents reflecting its disposition: "Different questions or additional questions in combination with the original request to produce the item or documentation are not authorized." *Williams*, 29 M.J. at 115 & n.2; *Hilton*, 29 M.J. at 1048-1049. Clearly, the requested "documents" or "papers" are required records.

There is no force to petitioner's suggestion that the regulation cannot be a record-keeping requirement since it does not prescribe the use of a particular form. Of course, the Air Force could have prescribed a specific form, but the Air Force was also free to permit servicemembers to retain the required information in the manner they found most convenient. A regulation requiring persons to maintain bona fide documentation does not cease to be a recordkeeping requirement simply because it does not dictate the precise manner in which the information is to be recorded or maintained.[2]

[2] Petitioner also attempts to characterize the regulation as requiring testimony rather than documents by referring to the regulation as a "show and tell" requirement. See Pet. 4-9. But

b. Petitioner challenges the recordkeeping requirement by invoking the exception enunciated in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965), and *Marchetti* v. *United States*, 390 U.S. 39 (1968). Pet. 6-8. In *Albertson* and *Marchetti* this Court held various registration requirements unconstitutional on the ground that they had a direct tendency to incriminate the registrants and were directed at a "selective group inherently suspect of criminal activities." *Albertson*, 382 U.S. at 79; *Marchetti*, 390 U.S. at 57. By contrast, in this case the disclosure requirement is directed at all military servicemembers—active duty, reserve, retired, their dependents, and civilian employees—if they purchase tax-free items in the Philippines. Such persons do not constitute an inherently suspect group; on the contrary, the group includes virtually all military personnel stationed in the Philippines.

In *Albertson* the government demanded admissions that the individuals were members of the Communist Party at a time when such membership was arguably criminal. 382 U.S. at 77. And in *Marchetti* the government demanded registration of the defendant's wagering business when wagering was illegal. 390 U.S. at 48-49. Because those laws required disclosure of illegal conduct, the individuals could not comply with the registration requirements without incriminating themselves. The recordkeeping requirement in this

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that characteristization is misleading. The regulation does not require the servicemember to "tell" anything; it requires only that the servicemember "show" the item or authorized disposition. GMCR Prohibited Acts and Practices ¶¶ 2r, 3h, Pet. App. 27a, 28a. The military courts have held that the regulation extends to documents and papers showing authorized disposition only; it does not authorize military officials to ask anything more. *Williams*, 29 M.J. at 115; *Hilton*, 29 M.J. at 1046.

case, by contrast, did not compel anyone to incriminate himself.

GMCR Prohibited Acts and Practices ¶ 2r requires the servicemember to show one of two things: "possession" of the tax-exempt item, or "authorized disposition" of it. Neither is incriminating. If the servicemember shows "possession" as required, he has not incriminated himself, because possession is legal. Nor has he incriminated himself if he shows "authorized disposition," since an authorized disposition is also legal.

Petitioner's assertion that he could be "prosecuted * * * for refusing to answer questions as to the location of th[e] items," Pet. 5, stems from a misreading of the regulations. The text of the regulations requires only proof of possession or authorized disposition: it does not require the individual to give the location of the item. In fact, as the Court of Military Appeals has explained, the regulation does not permit the suspect to be questioned about the whereabouts of the item. See *Williams*, 29 M.J. at 115 & n.2 ("Different questions or additional questions in combination with the original request to produce the item or documentation are not authorized."); *Hilton*, 29 M.J. at 1048-1049.

Petitioner's situation is conceptually no different from that of a motorist who is asked to produce, under threat of legal sanction, proof that his car is properly registered. Such a request does not violate the Fifth Amendment, for proof of registration does not tend to incriminate the motorist. The case here presents the same analysis. GMCR Prohibited Acts and Practices paragraphs 2r and 2h do not compel servicemembers to admit they have illegally disposed of property; it only requires them to show *lawful* possession or *authorized* disposition. It was for failing to make that

showing, not for failing to incriminate himself, that petitioner was prosecuted.

3. Even if the regulation were not a recordkeeping requirement, it still would not violate the Fifth Amendment. As this Court explained in *Baltimore City Dep't of Social Servs.* v. *Bouknight*, 493 U.S. 549, 558 (1990), "[w]hen a person assumes control over items that are the legitimate object of the government's non-criminal regulatory powers, the ability to invoke the privilege is reduced." Tax-exempt items are certainly a legitimate object of governmental regulation. Pursuant to its treaty obligations with the Republic of the Philippines, the Air Force must regulate the transfer of such items. To that end, the Air Force has promulgated regulations that permit servicemembers to purchase certain merchandise introduced into the Philippines without the payment of taxes, provided they comply with certain requirements and conditions enumerated in the regulations. Pet. App. 20a. One of the conditions is that the servicemember be willing to show possession or authorized disposition of the item when directed to do so by appropriate military authorities. Pet. App. 27a, 28a.

Nothing requires servicemembers to subject themselves to the regulation; they are free to avoid the regulation by not purchasing tax-exempt items. But, in the words of the Air Force Court of Military Review, "[i]f [they] want to play the game, [they] have to comply with its rules." *Hilton*, 29 M.J. at 1046. By purchasing the tax-exempt items, petitioner "submitted to the routine operation of the regulatory interests and agreed" to maintain the items or proof of disposition "in a manner consonant with the * * * regulatory system and subject to inspection," *Bouknight*, 493 U.S. at 558.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

WILLIAM R. DUGAN, JR.
Col., AFLSA, USAF

BRENDA J. HOLLIS
Lt. Col., AFLSA, USAF

JAMES C. SINWELL
Capt., AFLSA, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
Air Force Legal Services Division

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